

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

WILLIAM BELL,

Plaintiff,

vs.

JOHN PEERY, et al.,

Defendants.

3:11-cv-00745-RCJ (WGC)

**REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE**

This Report and Recommendation is made to the Honorable Robert C. Jones, Chief United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR IB 1-4. Before the court is Plaintiff's Motion for Temporary Restraining Order, or in the Alternative, Motion for Preliminary Injunction. (Doc. #5.)¹ Defendants opposed (Doc. # 9) and Plaintiff replied (Doc. # 36). After a thorough review, the court recommends that Plaintiff's motion be denied.

I. BACKGROUND

At all relevant times, Plaintiff William Bell (Plaintiff) was in custody of the Nevada Department of Corrections (NDOC), housed at Northern Nevada Correctional Center (NNCC). (Pl.'s Compl. (Doc. # 4) 1.) Plaintiff, a *pro se* prisoner, brings this action pursuant to 42 U.S.C. § 1983. (*Id.*) Defendants are Keith Ownsby, Janet Lamb, David Mar, John Peery, and Sandra Snider (collectively, Defendants). (*Id.* at 1-3.)

Plaintiff alleges that he was put on the anti-psychotic drug Abilify. (Doc. # 4 at 3-4.) He complained of difficulty breathing and swallowing, high blood pressure, chest pains, headaches,

¹ Refers to court's docket number.

1 dizziness, concentration and memory problems, insomnia and rectal leakage, and asked to stop
2 taking Abilify. (Doc. # 4 at 3-4, 6-16.) He alleges that Defendants refused to take him off the
3 medication and threatened to place him in mental health segregation if he refused to take the
4 drug. (*Id.*) On screening, the court determined that Plaintiff states a colorable claim for
5 deliberate indifference to a serious medical need under the Eighth Amendment. (Doc. # 3 at
6 5.)

7 Specifically, Plaintiff asserts that he went to the medical office on September 27, 2011,
8 to complain of a problem with anal leakage, and was told by defendant Lamb that his problem
9 was mental, and was coerced into taking Abilify with the threat that he would be placed in
10 mental health segregation if he refused. (Doc. # 4 at 3-4.) Plaintiff alleges that on September
11 29, 2011, he appeared to be suffering from an allergic reaction to Abilify, and asked to be taken
12 off the medication, but his request was denied. (*Id.* at 4.) He further alleges that his symptoms
13 of high blood pressure, chest pain and breathing symptoms were treated, but his symptoms of
14 swallowing, dizziness, depression, and concentration were ignored. (*Id.*) He contends that
15 prison officials made him continue taking Abilify despite the drug's warnings that users should
16 seek help if they suffer from a breathing problem when taking the drug. (*Id.*)

17 Plaintiff alleges that defendant Snyder, Director of Nursing, responded to his emergency
18 grievance, and failed to have Plaintiff immediately seen by a doctor. (Doc. # 4 at 8-9.) He
19 alleges that defendant Peery, Director of Nursing at NNCC, failed to properly supervise, train
20 and control nurses employed at NNCC, resulting in a denial of adequate medical care to
21 Plaintiff. (*Id.* at 9.)

22 Plaintiff goes on to allege that defendant Ownsby, a psychologist employed at NNCC,
23 saw Plaintiff on October 4, 2011. (Doc. # 4 at 10.) Plaintiff told defendant Ownsby of his
24 symptoms from taking Abilify, but defendant Ownsby told Plaintiff to continue taking the
25 medication or he would be housed in mental health segregation. (*Id.*) Finally, Plaintiff alleges
26 that he saw defendant Mar on October 5, 2011, and told him of his symptoms from taking
27 Abilify. (*Id.* at 11.) Plaintiff claims that defendant Mar treated Plaintiff's chest pain, high blood
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1 pressure, and shoulder pain, but ignored his symptoms of difficulty breathing and swallowing.
2 (*Id.*) Defendant Mar also told Plaintiff to continue taking Abilify. (*Id.* at 12.)

3 On October 21, 2011, Plaintiff filed the instant motion seeking injunctive relief in the
4 form of an order precluding Defendants from making Plaintiff to take Abilify and threatening
5 to place him in mental health segregation if he refuses. (Doc. # 5.)

6 On November 17, 2011, the court set a hearing on Plaintiff's request for injunctive relief
7 for November 29, 2011. (*See* Doc. # 14.) On November 22, 2011, Plaintiff filed a motion
8 requesting an extension of time to file his reply in support of his request for a temporary
9 restraining order or preliminary injunction. (Doc. # 15.) He also filed a motion seeking early
10 discovery on the same date. (Doc. # 16.)

11 On November 23, 2011, the court issued a minute order noting the representations in
12 Defendants' opposition to the request for injunctive relief that Plaintiff was not being forced
13 to take anti-psychotic medication. (Doc. # 17.) In view of these representations, as well as
14 Plaintiff's request for an extension of time, the court determined that any urgency associated
15 with the request for injunctive relief was moot and vacated the hearing. (*Id.*)

16 The court set a hearing on Plaintiff's motion seeking early discovery for December 19,
17 2011. (*Id.*) At that hearing, Plaintiff represented to the court that he was not taking Abilify,
18 and had not taken it since October 25, 2011. (*See* Doc. # 23.) Defense counsel made a
19 representation at the hearing that prison medical staff may come upon a factual scenario where
20 it may be necessary to involuntarily medicate Plaintiff. (*Id.*) In response to the court's concerns
21 regarding this scenario, defense counsel caused to be placed in Plaintiff's medical file a notice
22 that if it becomes necessary for Plaintiff to be treated by involuntary medication, the Deputy
23 Attorney General assigned to this case is to be notified, so he in turn can notify the court and
24 hold a status conference prior to the execution of involuntary medication procedures. (*See* Doc.
25 # 24, Doc. # 24-1.)

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II. LEGAL STANDARD

The purpose of a preliminary injunction or temporary restraining order is to preserve the status quo if the balance of equities so heavily favors the moving party that justice requires the court to intervene to secure the positions until the merits of the action are ultimately determined. *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). A preliminary injunction is an “extraordinary and drastic remedy” that is “never awarded as of right.” *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) (citations omitted). Instead, in every case, the court “must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.” *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 23 (2008) (internal quotation marks and citation omitted). The instant motion requires that the court determine whether Plaintiff has established the following: (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) an injunction is in the public interest. *Id.* at 20 (citations omitted).

Before *Winter*, courts in the Ninth Circuit applied an alternative “sliding-scale” test for issuing a preliminary injunction that allowed the movant to offset the weakness of a showing on one factor with the strength of another. *See Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). In *Winter*, the Supreme Court did not directly address the continued validity of the Ninth Circuit’s sliding-scale approach to preliminary injunctions. *See Winter*, 555 U.S. at 51 (Ginsburg, J., dissenting: “[C]ourts have evaluated claims for equitable relief on a ‘sliding scale,’ sometimes awarding relief based on a lower likelihood of harm when the likelihood of success is very high...This Court has never rejected that formulation, and I do not believe it does so today.”); *see also Alliance*, 632 F.3d at 1131. Instead, the portion of the sliding-scale test that allowed injunctive relief upon the possibility, as opposed to likelihood, of irreparable injury to the plaintiff, was expressly overruled by *Winter*. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009). The Ninth Circuit has since found that post-*Winter*, this circuit’s sliding-scale approach, or

1 “serious questions” test “survives...when applied as part of the four-element *Winter* test.”
 2 *Alliance*, 632 F.3d at 1131-32. “In other words, ‘serious questions going to the merits’ and a
 3 hardship balance that tips sharply toward the plaintiff can support issuance of an
 4 injunction, assuming the other two elements of the *Winter* test are also met.” *Id.*

5 An even more stringent standard is applied where mandatory, as opposed to
 6 prohibitory preliminary relief is sought. The Ninth Circuit has noted that although the same
 7 general principles inform the court’s analysis, “[w]here a party seeks mandatory
 8 preliminary relief that goes well beyond maintaining the status quo pendente lite, courts
 9 should be extremely cautious about issuing a preliminary injunction.” *Martin v.*
 10 *International Olympic Committee*, 740 F.2d 670, 675 (9th Cir. 1984) (citation omitted).
 11 Thus, an award of mandatory preliminary relief is not to be granted unless both the facts
 12 and the law clearly favor the moving party and extreme or very serious damage will result.
 13 *See Anderson v. United States*, 612 F.2d 1112, 1115 (9th Cir. 1979) (citations omitted). “[I]n
 14 doubtful cases” a mandatory injunction will not issue. *Id.*

15 Finally, the Prison Litigation Reform Act (PLRA) mandates that prisoner litigants
 16 must satisfy additional requirements when seeking preliminary injunctive relief against
 17 prison officials. The PLRA provides, in relevant part:

18 Preliminary injunctive relief must be narrowly drawn, extend no
 19 further than necessary to correct the harm the court finds
 20 requires preliminary relief, and be the least intrusive means
 21 necessary to correct that harm. The court shall give substantial
 22 weight to any adverse impact on public safety or the operation of
 23 a criminal justice system caused by the preliminary relief and
 24 shall respect the principles of comity set out in paragraph (1)(B)
 25 in tailoring any preliminary relief.
 26 18 U.S.C. § 3626(a)(2). Thus, § 3626(a)(2) limits the court’s power to grant preliminary
 27 injunctive relief to inmates. *See Gilmore v. People of the State of California*, 220 F.3d 987,
 28 998 (9th Cir. 2000). “Section 3626(a)...operates simultaneously to restrict the equity
 jurisdiction of federal courts and to protect the bargaining power of prison administrators-
 no longer may courts grant or approve relief that binds prison administrators to do more
 than the constitutional minimum.” *Id.* at 999.

The standard for issuing a temporary restraining order is identical to the standard for preliminary injunction. *See Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush and Co., Inc.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). Moreover, it is appropriate to treat a non-ex parte motion for a temporary restraining order and preliminary injunction as a motion for a preliminary injunction. *See* 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2951 (2d ed. 2007) (“When the opposing party actually receives notice of the application for a restraining order, the procedure that is followed does not differ functionally from that on an application for a preliminary injunction and the proceeding is not subject to any special requirements.”).

III. DISCUSSION

1. Likelihood of success on the merits

In order to be granted a preliminary injunction, Plaintiff must show he is likely to succeed on the merits of a claim that would entitle him to the equitable remedy he seeks. *Winter*, 555 U.S. at 20.

a. Eighth Amendment standard

A prisoner can establish an Eighth Amendment violation arising from deficient medical care if he can prove that prison officials were deliberately indifferent to a serious medical need. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). A finding of deliberate indifference involves the examination of two elements: “the seriousness of the prisoner’s medical need and the nature of the defendant’s responses to that need.” *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *rev’d on other grounds*, *WMX Tech., Inc. v. Miller*, 104 F.3d. 1133 (9th Cir. 1997). “A ‘serious’ medical need exists if the failure to treat a prisoner’s condition could result in further significant injury or the ‘unnecessary and wanton infliction of pain.’” *Id.* (citing *Estelle*, 429 U.S. at 104). Examples of conditions that are “serious” in nature include “an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual’s daily activities; or the existence of chronic and substantial pain.” *Id.* at 1059-60; *see also Lopez v. Smith*, 203 F.3d

1 1122, 1131 (9th Cir. 2000) (quoting *McGuckin* and finding that inmate whose jaw was broken
2 and mouth was wired shut for several months demonstrated a serious medical need).

3 If the medical needs are serious, Plaintiff must show that Defendants acted with
4 deliberate indifference to those needs. *Estelle*, 429 U.S. at 104. “Deliberate indifference is a
5 high legal standard.” *Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004). Deliberate
6 indifference entails something more than medical malpractice or even gross negligence. *Id.*
7 Inadvertence, by itself, is insufficient to establish a cause of action under § 1983. *McGuckin*,
8 974 F.2d at 1060. Instead, deliberate indifference is only present when a prison official “knows
9 of and disregards an excessive risk to inmate health or safety; the official must both be aware
10 of the facts which the inference could be drawn that a substantial risk of serious harm exists,
11 and he must also draw the inference.” *Farmer v. Brennan*, 511 U.S. 825, 837 (1994); *see also*
12 *Clement v. Gomez*, 298 F.3d 898, 904 (9th Cir. 2002) (quoting *Farmer*, 511 U.S. at 858).
13 “Prison officials are deliberately indifferent to a prisoner’s serious medical needs when they
14 deny, delay, or intentionally interfere with medical treatment” or the express orders of a
15 prisoner’s prior physician for reasons unrelated to the medical needs of the prisoner. *Hunt v.*
16 *Dental Dep’t.*, 865 F.2d 198, 201 (9th Cir. 1989) (internal quotation marks and citation
17 omitted). Where delay in receiving medical treatment is alleged, a prisoner must demonstrate
18 that the delay led to further injury. *McGuckin*, 974 F.2d at 1060.

19 In addition, a prison physician is not deliberately indifferent to an inmate’s serious
20 medical need when the physician prescribes a different method of treatment than that
21 requested by the inmate. *See McGuckin*, 974 F.2d at 1059 (explaining that negligence in
22 diagnosing or treating a medical condition, without more, does not violate a prisoner’s Eighth
23 Amendment rights); *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989) (difference of opinion
24 regarding the best course of medical treatment does not amount to deliberate indifference);
25 *Franklin v. Oregon*, 662 F.2d 1337, 1344 (9th Cir. 1981) (difference of opinion between a
26 prisoner-patient and medical staff regarding treatment is not cognizable under § 1983). To
27 establish that a difference of opinion amounted to deliberate indifference, the inmate “must
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1 show that the course of treatment the doctors chose was medically unacceptable under the
 2 circumstances” and that the course of treatment was chosen “in conscious disregard of an
 3 excessive risk to [the prisoner’s] health.” *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir.
 4 1996) (citations omitted).

5 **b. Analysis**

6 Plaintiff has not demonstrated a likelihood of success on the merits. Rather, after
 7 reviewing the evidence before the court, it appears that Plaintiff is unlikely to succeed on the
 8 merits and that his request for injunctive relief is moot.

9 According to the medical records produced by Defendants in support of their opposition
 10 to Plaintiff’s motion, Plaintiff signed a release of liability for refusal of medical treatment after
 11 refusing Abilify on October 25, 2011. (Doc. # 11-1 (Ex. B) at 2.) That Plaintiff has not taken
 12 Abilify since October 25, 2011, is confirmed in his continuing medication records. (Doc. # 11-1-
 13 Doc. # 11-5 (Ex. C), *see* refusal from October 25, 2011 on at Doc. # 11-5 at 22-26.)

14 Moreover, Plaintiff’s medical records indicate that he did not take Abilify forcibly.
 15 Plaintiff signed a consent form to take psychotropic medication, including Abilify, on January
 16 31, 2008. (Doc. # 11-5 (Ex. F) at 28.) This comports with NDOC’s regulations, which require
 17 a consent form to be completed before the administration of psychotropic medication.
 18 (See Medical Directive 305.10 at Doc. # 9-1 at 17-18.)² Plaintiff’s medical records indicate that
 19 he took Abilify voluntarily during the months of January and March through May of 2009,
 20 January through August of 2010, October 2010 through January 2011, and March 2011 through
 21 most of September 2011. (Doc. # 9-1 to Doc. # 9-5 (Ex. C).)

22
 23 ²Medical Directive 305 provides in pertinent part: “Psychotropic Medication form, DOC 2596
 24 must be completed and presented for the inmate’s signature. Psychotropic medication shall be given
 25 only after the inmate has given informed consent, except as provided under procedures for involuntary
 26 medication as described below.” (Doc. # 9-1 at 17.) “Consent signed by the inmate must be obtained
 27 for each prescribed psychotropic medication. In the event the inmate refuses to sign the consent, a
 28 Release of Liability form, DOC 2523 must be signed. An inmate who has not had his right to refuse
 psychotropic medications denied may withdraw consent at any time by stating his intention to medical
 staff and signing a Release of Liability form. Inmates who refuse medication will be scheduled to see
 the psychiatrist/practitioner at the earliest opportunity for further assessment.” (Doc. # 9-1 at 18.)

1 When Plaintiff refused to take Abilify on October 25, 2011, he signed the release of
2 liability form. (Doc. # 11-1 (Ex. B) at 2.) Plaintiff also agreed to a voluntary transfer to the
3 Mental Health Unit on October 25, 2011. (Doc. # 11-5 (Ex. H) at 30.) His admission to the
4 Mental Health Unit was authorized by a physician at NNCC. (Doc. # 11-5 (Ex. J) at 32.) If
5 Plaintiff chooses to revoke his consent to placement in the Mental Health Unit, his housing
6 status will be reevaluated. (See Doc. # 9-1 (Ex. I) at 36-38.)

7 While Plaintiff now claims that he was forced to take Abilify until February 2012 (Pl.'s
8 Reply (Doc. # 36)), this is belied by the medical records as well as Plaintiff's representation to
9 the court on December 19, 2011, that Plaintiff was not taking Abilify and had not taken it since
10 October 25, 2011. (See Doc. # 23.)

11 The court agrees with Defendants that at most, Plaintiff has demonstrated a difference
12 of opinion with respect to the course of treatment chosen by his medical care providers.
13 Plaintiff believes Abilify is causing him various ailments, while his doctors disagree. In any
14 event, as of the present, Plaintiff is not being forced to take Abilify. Therefore, Plaintiff has not
15 demonstrated deliberate indifference to a serious medical need in order to show he is likely to
16 succeed on the merits. Moreover, his request for an order that Defendants be precluded from
17 making him taking Abilify is moot.

18 In sum, the court finds that Plaintiff has not established a likelihood of success on the
19 merits; a prerequisite to injunctive relief.

20 **2. Irreparable Injury**

21 Plaintiff must demonstrate that irreparable injury is likely in the absence of an
22 injunction. *Winter*, 555 U.S. at 20. "[A] preliminary injunction will not be issued simply to
23 prevent the possibility of some remote future injury." *Id.* at 22 (citations omitted).

24 The medical records before the court establish that Plaintiff has refused to take Abilify,
25 and is no longer taking it at the present time. Accordingly, he has not established that he will
26 suffer irreparable harm in the absence of injunctive relief.

27 It is important to note that Plaintiff was taking Abilify voluntarily from 2009 through
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1 September 2011. (*See* Doc. # 11-1 to Doc. # 11-5 (Ex. C).) Moreover, during the time period of
2 2009 through the majority of September 2011, Plaintiff did not submit a single kite with
3 complaints of any injury as a result of taking Abilify. (*See* Doc. # 10-1, Doc. # 10-2 at 1-5 (Ex.
4 K)). Actually, Plaintiff's first reference to a complaint about Abilify is in a kite dated
5 September 29, 2011. (Doc. # 10-2 (Ex. K) at 5.) Nor do Plaintiff's medical progress notes from
6 January 1, 2009 through October 25, 2011, reference complaints of injuries or illness due to
7 taking Abilify. (Doc. # 10-2 to Doc. # 10-4 (Ex. L).) In fact, Defendants point out several
8 progress note entries that reference Plaintiff taking Abilify and indicate Plaintiff was not
9 experiencing pain or discomfort. (*See* Doc. # 9 at 8.)

10 Additionally, a notice has been placed in Plaintiff's medical file, effective December 19,
11 2011, stating that if it ever becomes necessary for Plaintiff to be involuntarily medicated, the
12 court has ordered that the Deputy Attorney General on this case be notified so that a status
13 conference can be held with the court prior to the execution of any involuntary medication
14 order. (*See* Doc. # 24, Doc. # 24-1.) This appears to obviate the risk of any asserted future
15 irreparable harm.

16 Plaintiff has failed to meet his burden of establishing the likelihood of irreparable injury.

17 **3. Balance of hardships**

18 A party seeking injunctive relief "must establish...that the balance of equities tips in his
19 favor." *Winter*, 555 U.S. at 20.

20 Plaintiff fails to establish that the balance of hardships falls in his favor. Absent a
21 showing sufficient to find harm to Plaintiff, there is nothing to tip the balance of equities in
22 Plaintiff's favor. The court finds Plaintiff has not met his burden as to this prerequisite to
23 injunctive relief.

24 **4. Public interest**

25 "In exercising their sound discretion, courts of equity should pay particular regard for
26 the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555
27 U.S. at 24 (quotation marks and citation omitted).

Nor has Plaintiff demonstrated that injunctive relief would be in the public's interest. Plaintiff alleged that he was being forcibly medicated with a anti-psychotic medication that caused him harm, but these allegations are belied by the medical records. Therefore, the court cannot find that injunctive relief would be in the public's interest.

5. Conclusion

The prerequisites for injunctive relief not having been met, Plaintiff's request for a temporary restraining order and preliminary injunction should be denied.

IV. RECOMMENDATION

IT IS HEREBY RECOMMENDED that the District Judge enter an Order denying Plaintiff's request for a temporary restraining order or preliminary injunction (Doc. # 5).

The parties should be aware of the following:

1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice, specific written objections to this Report and Recommendation within fourteen (14) days of receipt. These objections should be titled "Objections to Magistrate Judge's Report and Recommendation" and should be accompanied by points and authorities for consideration by the District Court.

2. That this Report and Recommendation is not an appealable order and that any notice of appeal pursuant to Rule 4(a)(1), Fed. R. App. P., should not be filed until entry of the District Court's judgment.

DATED: April 11, 2012.



WILLIAM G. COBB
UNITED STATES MAGISTRATE JUDGE